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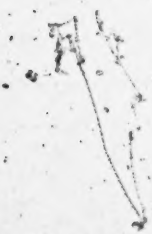

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1195.

WILLIAM JOE JOHNSON,
Petitioner,

vs.

HARRY S. AVERY, Commissioner, Department of Correction, et al.,
Respondent.

SUPPLEMENTAL REPLY TO PETITION FOR CERTIORARI.

Counsel for the respondent in this cause requests permission to file this supplemental brief for the purpose of further analyzing and discussing the legal problems involved.

QUESTIONS PRESENTED.

Counsel for the petitioner has presented three questions in his brief:

(1) Whether or not a state prison regulation which prohibits a prisoner from assisting a fellow inmate in

preparing a petition for writ of habeas corpus is invalid because of Section 28 U. S. C. 2242;

(2) Whether or not such a prison regulation prohibiting one inmate from assisting another inmate in preparing habeas corpus petitions contravenes the due process and equal protection clauses, 14th Amendment, Constitution of the United States; and,

(3) Whether or not a Federal District Judge may, by the issuance of a writ of habeas corpus, prevent prison officials from enforcing disciplinarian measures against a prisoner for violation of prison regulations which are contrary to the Federal constitution and Federal statutes.

ARGUMENT.

The latter of these three questions, of course, is easy to eliminate. Counsel for the respondent agrees that a Federal District Judge may prohibit, by the writ of habeas corpus, disciplinarian measures by state prison officials against prisoners who have violated prison regulations when such regulations conflict with the Federal law once it has been determined that such regulations are in violation of Federal rights.

Counsel for the state also thinks that the first question is not too difficult to eliminate. Section 28 U. S. C. 2242 is no authority for a prisoner to prepare or draft a habeas corpus petition for a fellow prisoner nor to advise a fellow inmate on the subject. This section of the Federal Code provides that application for writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf. It was held by the District Judge that the words "or by someone acting in his behalf" constitute authority for one prison inmate to prepare a habeas corpus petition for a fellow prisoner and this position is strongly insisted upon in the brief of counsel for the petitioner.

With deference to the District Judge and opposing counsel, the statute under consideration is not such authority. As a matter of fact, the statute does not deal with the preparation of applications for writ of habeas corpus, it only provides that such application must be in writing and verified and this must be done by the applicant or some person acting in his behalf. Signing the petition and verifying it is nothing more than a ministerial act. "Jailhouse Lawyers" or "Writ Writers" do not confine themselves to these ministerial acts. They compose the petition or combination petition and brief, and it must be a matter of common knowledge that they allege matters

the inmate for whom it is prepared never heard about or even dreamed of until he is asked about them at a hearing on the petition.

Even if the statute were authority for someone acting in behalf of the petitioner to prepare and draft the petition, it is not authority for anyone to act in his behalf. Congress in the enactment of this statute must have contemplated the "some person acting in his behalf" to be some person otherwise qualified or authorized to so act.

DISCUSSION OF MAIN QUESTION.

The main question presented by the petitioner is whether or not a restriction upon his right to prepare a habeas corpus petition for a fellow inmate amounts to a denial of due process of law or an infringement upon the right of free speech; and, if the prison regulation denying this right is valid whether or not the segregation of the petitioner from other prisoners as a means of punishment or preventing his violation of the regulation is unreasonable. The State submits that both of these questions are most interesting and both are serious questions. There is authority, of course, for one person to file a habeas corpus petition for another. **Rosenberg v. United States**, 346 U. S. 273, 73 S. Ct. 1152, 97 L. Ed. 2d 1607, cited in opposing counsel's brief, is authority for a lawyer to prepare a habeas corpus petition in behalf of another person. **United States ex rel. Accardi v. Shaughnessy**, 347 U. S. 260, 74 S. Ct. 499, 98 L. Ed. 681, is authority for such a petition to be filed by a prisoner's wife, and **United States ex rel. Toth v. Quarles**, 350 U. S. 11, 76 S. Ct. 1, 100 L. Ed. 8, is authority for such a petition to be filed by a prisoner's sister. These cases are also cited in petitioner's brief. Also cited in petitioner's brief is the case of **Smith v. Bennett**, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39, wherein it was held that requiring a filing fee by an indigent prisoner violated the equal protection clause, 14th

Amendment, Federal Constitution. **Ex parte Hull**, 312 U. S. 546, 61 S. Ct. 823, 85 L. Ed. 1034, and other authorities cited in opposing counsel's brief, make clear that a state and its officers may not unusually abridge or impair petitioner's right to apply to Federal Court for a writ of habeas corpus.

To determine the reasonableness of a regulation, of course, all factors must be taken into consideration. The one factor present in this case that was not present in the foregoing cases is the effect upon the morale of prisoners resulting from the activities of "Jailhouse Lawyers and Writ Writers" if allowed to operate unrestricted or if allowed to operate at all. What amounts to due process in any case depends upon the circumstances. In **Bradford v. School District No. 20**, 244 F. Supp. 768, 773, it was said:

> "What constitutes 'due process' within the meaning of the Fourteenth Amendment cannot be precisely defined. It must be decided in the light of that which is just and reasonable, considering all factors, and cannot unduly confine those officials who have the responsibility of governing. As stated by Mr. Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 163, 71 S. Ct. 624, 644, 95 L. Ed. 817 (1951):
>
> > 'The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.'"

Of course, the right of free speech is not an absolute right as has been held by this Court in numerous cases,

Frahwerk v. United States, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; **Schenck v. United States**, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470; **Kasper v. Brittian**, 245 Fed. 2d 92, rehearing denied petition for certiorari, 355 U. S. 886, 78 S. Ct. 147, 2 L. Ed. 2d 115.

In considering this question, the Federal District Judge held:

> "for all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer', their possibly valid constitutional claims will never be heard in any court. At stake, then, is not only the claim of the instant petitioner, but more importantly, under the broad terms of the regulation, the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests of petitions of their day in court. Without some assistance, their right to habeas corpus in many instances becomes empty and meaningless. It is within this framework that we must examine the instant petition." Appendix 44.

The United States Circuit Court of Appeals, Fifth Circuit, disagreed with the Federal District Court in these words:

> "the District Court further held that unless petitioner could continue to serve as a 'writ writer' or 'jail-house lawyer' for his fellow inmates, their constitutional rights to the effective aid of habeas corpus would be endangered since 'without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter, or request.' We must disagree with both of these conclusions." Appendix 92.

The evidentiary basis for the opinion of either Court does not appear in the record. Apparently both courts

drew their conclusions from their own experiences. There is nothing in the record to support a finding one way or the other. In **Hatfield v. Bailleaux,** 290 Fed. 2d 632 (9th Circuit), this was said on the subject:

> "there is no finding that appellants have been denied all access to the courts. There is no finding that by reason of any prison regulation or practice pertaining to the preparation, service and filing of such pleadings or documents, or to the sending and receiving of such communications, any appellee has ever lost the right to commence, prosecute, defend or appeal in any court proceeding involving personal liberty. Nor is there any finding that by reason of prison regulations and practices any appellee has been substantially delayed in obtaining a judicial determination in any such court proceeding.
> In the absence of findings of this kind it is difficult to see how there could possibly be warrant for the conclusion that appellees have been deprived of reasonable access to the courts."

Likewise the record is void of evidence to indicate what effect allowing jail-house lawyers and writ writers to go unrestricted would have upon the prison morale.

The United States Court of Appeals found that there was evidence in **Hatfield v. Bailleaux,** supra, showing the harmful effects upon the morale of prisoners by cell-house lawyers which it seemingly approved although there was no finding on the question by the District Court in that case. An excerpt from page 639 of the Hatfield case is as follows:

> "While the court did not enter findings as to the purpose of these regulations and practices, the evidence is undisputed as to those purposes. Most of these regulations and practices are for the purpose of discouraging the informal practice of law by what

were termed 'cell-house lawyers'. Prison officials testified that if permitted to engage in such practice, aggressive inmates of superior intelligence exploit and dominate weaker prisoners of inferior intelligence. The practice also tends to develop a group of inmate leaders, which is discouraged in all institutions."

An observation made in a concurring opinion in the case of **Weller v. Dickson**, 314 Fed. 2d 598, 602, on the subject, is as follows:

> "We know from sad experience with habeas corpus and 2255 cases that imprisoned felons are seldom, if ever, deterred by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court. The prospect of amercing their jailers in damages must be a most tempting one, even if it will not get them their freedom. The disruption of prison discipline that the maintenance of such suits, at government expense, can bring about, is not difficult to imagine. Particularly since Monroe v. Pape, 1961, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, it has become apparent that the 'jailhouse lawyers' think that they have a new bonanza in the Civil Rights Act."

The Federal Bureau of Prisons must have known of the discipline problems that arise when one inmate of a prison assists another inmate in habeas corpus petitions, for it has directed the warden of the Federal prison to issue general rules prohibiting the practice. In **White v. Blackwell**, 277 F. S. 211, the Court recognized that such a directive had been given to the warden of the Federal prison by the Bureau of Federal Prisons.

From the foregoing it does not appear that prohibiting one inmate from preparing habeas corpus petitions for

a fellow inmate by prison authorities unreasonably hampers inmates from gaining access to the courts, but on the other hand it is a practice which tends to undermine discipline in the prison to the extent that many prison authorities, both State and Federal, have found it necessary to eliminate or prohibit the practice. It is said in the brief of opposing counsel that the preparation of such petitions is within the supervision of the court and that the court is in a position to prevent abuses and limit the consequences. Of course, this might be one way of handling the problem but it is insisted that it would not be as effective as preventing the practice and it would not eliminate the necessity for the courts and lawyers to spend a tremendous amount of time going through long petitions written by persons not deterred by the penalties of perjury according to **Weller v. Dickson,** supra. The petitioner in this case has filed a number of habeas corpus petitions for himself one of which contained 45 pages (Tr. 38-41).

The final question to be considered is whether or not the procedure for preventing the petitioner from aiding another inmate in the preparation of petitions is reasonable. From his own testimony it is evident that he does not intend to restrict himself from drawing such petitions as long as he is permitted to associate with other prisoners. His counsel at the trial level made this statement:

> "Does not intend and I don't think, if Your Honor please, that he should be made to quit drawing them up. I think he fully intends, if he keeps out, to keep on drawing them up if he can be furnished the materials, because I think he's entitled to do so, and entitled to have access through these petitions to the Court" (Tr. 41-42).

The record further indicates that the petitioner has agreed on numerous occasions not to write more petitions

for habeas corpus for fellow inmates but as soon as permitted to associate with other prisoners he immediately started anew.

If the practice is one that is within the authority of the prison authorities to eliminate them, it appears from the attitude of the petitioner that the only way to prevent his assisting other inmates is to prevent his association with them. Of course, materials for filing petitions could be kept from the petitioner but this would have the effect of denying him access to the court, and the state of Tennessee, of course, recognizes that the petitioner cannot be constitutionally denied access to the Court.

The record does not indicate the number of prisoners in the State Penitentiary, but this court can judicially know that there are many prisoners in most prisons throughout the United States. The alternative to separating the "Writ Writers" from the other prisoners would be to exercise sufficient surveillance over the other numerous prisoners to see that they do not receive assistance in the preparation of habeas corpus petitions. This would involve a great deal of restriction upon the rights of the other prisoners and it would require a huge increase in prison personnel thus increasing the tax burden for all taxpayers. It would also reduce the opportunity for prison authorities and personnel to use their energies and resources to do things constructive toward the rehabilitation of the prisoners committed to their custody.

Respectfully submitted,

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Certificate of Service.

I certify that a copy of the foregoing Supplemental Reply to Petition for Certiorari of the State has been furnished to Mr. Karl P. Warden, Vanderbilt University Law School, Nashville, Tennessee, and to Mr. Pierce Winningham, Attorney at Law, Nashville, Tennessee, this the 29 day of October, 1968.

Thomas E. Fox,
Deputy Attorney General.